

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-009578

06/09/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

BASE CONSTRUCTION INC

RICHARD L COBB

v.

SCOTT BAXTER, et al.

R STEWART HALSTEAD

MONTGOMERY LEE
AZ REGISTRAR OF CONTRACTORS
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before the Registrar of Contractors and the Office of Administrative Hearings and the memoranda submitted by counsel.

1. Factual and procedural background

In January 2001, Defendant/Respondent, Scott Baxter (“Baxter”), agreed to purchase a home in the Town of Fountain Hills that was under construction from Michael Copping (“Copping”).¹ Copping was not a licensed contractor and originally obtained a permit to build the home as an owner/builder of the project.² By selling the property, Copping lost his owner/builder status and was no longer exempt from the contractor licensure requirements. Baxter knew that Copping was unlicensed.³

¹ Recommended Decision of Administrative Law Judge, dated March 27, 2002 (“ALJ decision”), ¶ 4

² *Id.*

³ ALJ decision, ¶¶ 6,7.

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On May 2, 2001, the Town of Fountain Hills made an addendum to the building permit that identified Plaintiff/Petitioner, Base Construction, Inc. ("Base") as the permit holder and listed its license on the project. Salvador Patin Rodriguez ("Rodriguez") is the qualifying party identified on the Base license and on the addendum to the building permit.⁴ The ALJ found that Copping, the owner/builder entered into a contractual relationship with Base, for Base to be the general contractor on the project.⁵ The sale of the house to Baxter closed in July 2001, although the construction was not complete.⁶ Copping apparently left the project in August, 2001.⁷

On September 17, 2001, Baxter filed a complaint with the Registrar against Base regarding the quality of the contractor's workmanship on numerous items on the Fountain Hills property.⁸ The Registrar's inspector, Joe Cotton, conducted a jobsite inspection and as a result of his review of conditions, issued a Corrective Work Order on October 15, 2001 directing Base to make corrections and repair of 35 items.⁹ Base has stipulated that it has made no effort to correct the deficiencies.¹⁰

The Registrar issued a Citation and Complaint against Base's license on December 17, 2001.¹¹ A hearing took place on March 25, 2002 before Administrative Law Judge Gary B. Strickland. Baxter and Rodriguez testified with several other witnesses, and several exhibits were received into the record.¹² On March 27 2002, the ALJ issued his recommended decision in which he found Base in violation of A.R.S. § 32-1154(A)(3),(7), and (23) with respect to the Fountain Hills property.¹³ The Registrar issued its order in which it adopted the ALJ recommended decision with some modification.¹⁴

On May 26, 2002, Base timely filed this appeal seeking reversal of the Registrar's Order and a stay. Baxter filed a Motion for Rehearing with the Registrar. The Registrar entered an Order granting Baxter's request for Rehearing on June 7, 2002 and set a hearing to take place September 17, 2002.¹⁵ On July 24, 2002, the Registrar vacated the hearing because this appeal

⁴ ALJ decision, ¶ 2; Exhibit 1.

⁵ ALJ decision, ¶¶ 8, 22.

⁶ Transcript of Proceedings, March 25, 2002 ("TR") page

⁷ TR, page 18.

⁸ ALJ decision, ¶ 9.

⁹ ALJ decision, ¶¶ 10, 11.

¹⁰ ALJ decision, ¶ 12.

¹¹ ALJ decision, ¶ 14.

¹² ALJ decision, ¶ 16. Baxter offered Exhibits 1 through 4, of which all but Exhibit 2 were received. Respondent's exhibits A through J were each received. *Id.* Baxter's Exhibit 4 and Base's Exhibits A through J were not submitted to the ALJ and are not included in the Record on Review.

¹³ ALJ decision

¹⁴ Registrar of Contractor's Order, CASE NO. 02-0515, April 26, 2002 ("Registrar's Order").

¹⁵ Registrar of Contractor's Order Granting Rehearing, CASE NO. 02-0515, June 7, 2002. The Rehearing Order and the order setting the hearing are part of the record in this action by stipulation and this Court's Order dated December 6, 2002.

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had been filed.¹⁶ On December 2, 2002, Baxter filed a Counterclaim/Crossclaim and Counter/Cross-Petition for Review of Administrative Decision seeking review of the Registrar's Order.

Base appeals the order that found it in violation of law with respect to the project. Baxter filed a cross-appeal on the grounds that the remedy ordered is inadequate and contrary to law. Adequacy of the remedy was the basis for the rehearing that the Registrar granted and subsequently vacated because this action was pending. Although the orders regarding rehearing are part of the record, the only order appealed from is the Registrar's Order adopting the ALJ recommendation with modification and the underlying ALJ recommended decision.

Although Base does not dispute that the work performed on the project was deficient and that it refused to perform the corrective action ordered by the Registrar, Base contends that it is not responsible for the work on the project, because it was not the general contractor on the project. Base appeals the Registrar's Order on that ground. Base requests that the order be reversed to absolve it of liability for this project.

Baxter contends that the Registrar correctly found liability but that the remedy recommended by the ALJ and adopted by the Registrar in its April 26, 2002 Order is inadequate in that it did not address and could impair Baxter's claim against the Residential Contractors' Recovery Fund ("Fund"). Baxter also contends that the ALJ erred to Baxter's detriment in excluding evidence offered by Baxter regarding his damages on the project. Both issues were to be the subject of the vacated rehearing ordered by the Registrar. Baxter requests that he be awarded his claim against the Residential Contractors' Recovery Fund or that the matter be remanded to the Registrar for further proceedings in compliance with the rehearing order.

2. Standard of Review

The issues in this case concern the sufficiency of the evidence to support the Registrar's Order and whether the remedy ordered is contrary to law. On appeal of an administrative agency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was illegal, arbitrary, capricious, or was an abuse of discretion.¹⁷ As to questions of fact, this court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.¹⁸ The reviewing court will view the evidence in a light most favorable to upholding the agency's decision and will "affirm that decision if it is supported by

¹⁶ Registrar's Order Vacating Hearing, July 24, 2002. This Order is part of the record in this action. *Id.*

¹⁷ A.R.S. § 12-910(G), *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

¹⁸ *Petrus v. Arizona State Liquor Board*, 129 Ariz 449, 452, 631 P.2d 1107 (App. 1981).

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any reasonable interpretation of the record.”¹⁹ On matters of credibility, the reviewing court ordinarily defers to the trier of fact.²⁰

Questions of statutory interpretation involve questions of law and the appellate court is not bound by the administrative agency’s conclusion.²¹ The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.²² However, the agency’s interpretation of laws or regulations it implements is entitled to great weight.²³

3. Discussion

a. The violations found by the Registrar

This case is somewhat unusual in that both parties seek relief from the agency’s order and in that the case is mired in issues of fact. In essence, the parties present contradictory versions of the facts. Base contends that although Copping asked it to be the general contractor on the project, it did not reach agreement with Copping and did not become the general contractor until sometime in August 2001 when Base agreed with Baxter that it would complete the project. This arrangement lasted only a week according to Base. The Registrar ordered Base to complete the corrective work, Base argues, on the mistaken belief that Base was the general contractor on the project.²⁴

For his part, Baxter contends that Base became general contractor and acted as general contractor on the project at least as early as May 2, 2001, when Base appeared as the licensed contractor on the Fountain Hills building permit addendum. Therefore Base is responsible for the project and for the violations connected with it.²⁵ The ALJ and the Registrar adopted Baxter’s version of the facts.²⁶

Base contends that it was not the general contractor on the project and for that reason it has no responsibility for the work on the project. Base argues that the order finding it to be the general contractor on the Fountain Hills project and responsible for the work deficiencies is not

¹⁹ *Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1998).

²⁰ *Anamax Mining Co. v. Arizona Dept. of Economic Security*, 147 Ariz. 482, 486, 711 P.2d 621 (App. 1985).

²¹ *Seigal*, 167 Ariz. 401.

²² *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

²³ *Baca*, 191 Ariz. at 46, 951 P.2d. at 1238 (Board’s interpretation of statutes and DES regulations is entitled to great weight.”).

²⁴ Plaintiff’s Memorandum in Support of Appeal From Administrative Decision, December 17, 2002, (“Plaintiff’s Memorandum”), page 2.

²⁵ Baxter’s Response Brief and Respondent Baxter’s Opening Brief on Cross-Petition to Revise or Remand Administrative decision, January 17, 2003, (“Baxter’s Response Brief”), 8-12.

²⁶ ALJ decision, ¶¶ 18-22; Registrar’s Order.

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supported by the evidence. Base argues that there was no agreement between it and Copping, that Baxter paid Copping and not Base, and that its license was fraudulently added to the building permit.

Mr. Rodriguez, the qualifying party on Base's license testified that there was no agreement between Base and Copping for Base to become the general contractor.²⁷ He further testified that there is no written document that purports to be the agreement between Base and Copping.²⁸ In addition, Baxter made payments to Copping after the time Base was found to have become the general contractor.²⁹ Rodriguez testified that Base did not receive compensation for work as general contractor.³⁰ With respect to the town building permit, Rodriguez testified that his name and license number were added to the building permit without his knowledge or permission.³¹

The Registrar found that Base was the general contractor on the project beginning April or May 2001. Base admitted to two Registrar of Contractors inspectors that Base was the general contractor on the Fountain Hills project beginning in the period April 2001. Mr. Boyle testified that Rodriguez specifically told him that "he had signed on the permit, he had been hired by Copping to get the permit back up."³² The permit was obtained May 2, 2001. Inspector Cotton testified that Rodriguez "told me that he had made an arrangement with Mr. Copping to be listed as the prime contractor on the permit in exchange for both work and cash."³³ Mr. Cotton's testimony places the arrangement in May 2001.

Both Baxter and Larry Gaston, architectural consultant, testified that Rodriguez told them that he and Copping agreed that Base would be the general contractor beginning sometime in April or May 2001.³⁴ Gaston testified that "Rodriguez was the general contractor on the job."³⁵ Gaston also testified that Rodriguez worked with the town inspectors in getting the job approved, represented to the town inspectors that he was the general, worked with him on the plans as the general contractor and that Rodriguez supervised the work.³⁶ Baxter and Gaston both testified that Base actually performed as the general contractor on the project during the period from April or May 2, 2001.³⁷ Base and the qualifying party Rodriguez and Base's license number appear on the building permit as the general contractor beginning May 2, 2001.³⁸

²⁷ TR. 134, 137.

²⁸ *Id.*

²⁹ TR. 89,90.

³⁰ TR. 140, 141, 143.

³¹ TR. 143, 150.

³² TR. 63, 64.

³³ TR. 37.

³⁴ TR. 17,48.

³⁵ TR. 48.

³⁶ TR. 46-50

³⁷ TR. 15,16,46,47.

³⁸ Exhibit 1.

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The ALJ concluded that allowing his license to be used on the project was prima facie evidence of a contractual relationship between Base and Copping.³⁹ The Registrar specifically found that when Copping “decided to sell rather than occupy the property . . . Mr. Copping properly hired [Base] as the general contractor for the project.”⁴⁰

The Registrar found that Base violated A.R.S. § 32-1154(A)(3), § 32-1154(A)(23), and § 32-1154(A)(7) in connection with the Fountain Hills project.⁴¹ A.R.S. § 32-1154(A)(3) prohibits any license holder from committing a “[v]iolation of any rule adopted by the registrar.” A.R.S. § 32-1154(A)(23) prohibits a license holder from failing to take appropriate corrective action to comply with a writing directive from the registrar. The record supports and Base agrees that there were numerous deficiencies in workmanship on the project.⁴² Further, Base concedes that it failed to take corrective action after being given a written directive from the Registrar. Base merely contends that it is not responsible for the work on the project because it was not the general contractor and that it had a valid justification to ignore the corrective work order. However, Base’s justification is simply that it is not responsible because it was not the general contractor. Because this Court affirms the Registrar’s conclusion that Base was the general contractor on the project, it also finds that the conclusions regarding these violations are supported by substantial evidence in the record.

A.R.S. § 32-1154(A)(7) provides that the license holder shall not do “a wrongful act . . . resulting in another person being substantially injured.” Base’s wrongful acts injured Baxter in that Baxter incurred expenses to correct the deficient work.⁴³ Base does not actually dispute the Registrar’s conclusions regarding deficient work and Base’s failure to take corrective action. With respect to each of the violations, Base merely contends it is not responsible for them.

Base contends that even if it had entered into an agreement with Copping to be the general contractor on the project, Base’s obligations would be to Copping and not to Baxter. Base “cannot be found to have any obligation to perform work for Baxter under the purported agreement between Copping and Base....”⁴⁴ However, as the general contractor on the project, Base was obliged to perform the work on the project in a workmanlike and professional manner.⁴⁵ Privity is not required for the violations found by the Registrar.⁴⁶ The purpose of the regulation of contractors is to protect the public.⁴⁷ Where the purpose of a regulation is to

³⁹ ALJ decision, ¶ 22.

⁴⁰ Registrar’s Order.

⁴¹ ALJ decision, Conclusions of Law. The ALJ decision also found a violation of A.R.S. § 32-1154(A)(10), however the Registrar deleted that conclusion in the final order. “Conclusion of Law #4 shall be deleted in its entirety.” Registrar’s Order.

⁴² Registrar’s corrective order, TR. . .

⁴³ TR. 43.

⁴⁴ Plaintiff’s Memorandum, p. 14.

⁴⁵ Arizona Administrative Code, R4-9-108.

⁴⁶ Op. A. G. No. 73-21-L (The Registrar of Contractors could not require privity of contract as prerequisite to action on complaint.)

⁴⁷ *Better Homes Construction Inc. v. Goldwater*, 203 Ariz. 295, 53 P.3d 1139 (App. 2002).

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protect the public, the statute should be construed so as to uphold that purpose.⁴⁸ As the general contractor, Base is responsible for the violations found. The ALJ found that “[t]he purpose of the agreement between Copping and Base Construction was . . .to protect the purchaser from faulty workmanship as is required by Title 32.”⁴⁹ Baxter, the purchaser, is entitled to that protection.

Although the parties strongly disagree about the events surrounding the project, this Court is not charged with determining the facts of the case. If the agency’s conclusions are supported by substantial evidence, that is the end of this Court’s inquiry. This Court views the evidence in a light most favorable to upholding the agency’s decision and will “affirm that decision if it is supported by any reasonable interpretation of the record.”⁵⁰ As to questions of fact, this court does not substitute its judgment for that of the administrative agency.⁵¹ Moreover, on matters of credibility, the reviewing court ordinarily defers to the trier of fact.⁵² This case is fraught with issues of fact and matters of credibility. Here, the record provides substantial support for the Registrar’s conclusion that the work performed on the Fountain Hills project violated Arizona law and that Base was the general contractor and therefore responsible for the work.⁵³

b. The cross appeal

In his cross appeal, Baxter contends that the Registrar erred in its Order dated April 26, 2002, in that it did not award Baxter his claim against the Residential Contractor’s Recovery Fund. However, the Administrative Review Act⁵⁴ and the Arizona Rules of Procedure for Judicial Review of Administrative Decisions do not provide for cross-appeals. A.R.S. Section 12-904(A) provides in part:

An action to review a final administrative decision shall be commenced by filing a complaint within 35 days from the date when a copy of the decision sought to be reviewed is served upon the party affected.

This statute does not provide for filing of cross-appeals. Arizona’s Rules of Procedure for the review for judicial review of administrative decisions similarly does not provide for cross-

⁴⁸ *Id.* 203 Ariz. 295, 53 P.3d 1139 (App. 2002).

⁴⁹ ALJ decision, ¶ 22.

⁵⁰ *Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1998).

⁵¹ *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107 (App. 1981).

⁵² *Anamax Mining Co. v. Arizona Dept. of Economic Security*, 147 Ariz. 482, 486, 711 P.2d 621 (App. 1985).

⁵³ The ALJ concluded that Base had violated law by “aiding and abetting an unlicensed contractor.” However, the Registrar rejected that conclusion and specifically deleted it from the final order. That finding is not at issue on this appeal and this court does not reach the issue because it affirms the Registrar’s order that the evidence supports the conclusion that Base was the general contractor.

⁵⁴ A.R.S. Section 12-901 et seq.

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appeals. Those rules provide for the filing of a Plaintiff's Opening Brief and a description of the complaint which must be filed in the Superior Court. No provisions allow or permit the filing of a cross-appeal. This Court concludes that the Administrative Review Act and Arizona Rules of Procedure for Judicial Review of Administrative Decisions do not contemplate the filing of cross-appeals in administrative review actions. Rather, a person who desires to appeal an administrative agency's decision, must follow the procedures quoted above in A.R.S. Section 12-904(A) by filing within 35 days from the date when a copy of the decision sought to be reviewed is served upon the party affected. This 30-day time limit applies to all appeals from a determination by an administrative agency. This Court further concludes that Baxter did not timely file a Notice of Appeal from the order sought to be appealed. This Court concludes that it is without jurisdiction to address any of the issues raised by Baxter in his cross-appeal.

Because the ALJ failed to address Baxter's claim against the fund, the Registrar granted Baxter's request for rehearing and demanded that the ALJ rehear the issue. It is only because the complaint in this action was filed prior to the scheduled rehearing that the matter has not been reheard by the ALJ and the issue decided in accordance with the Registrar's procedures.⁵⁵ The purpose of the rehearing provision is to give the agency an opportunity to correct its own mistakes before the matter is brought to court. *Cogent Public Serv., Inc. v. Arizona Corp. Comm'n.*⁵⁶ The Registrar was in the process of correcting its error when the proceeding was interrupted by this appeal. The Registrar will have jurisdiction and authority to rehear this case, including the issues raised in Baxter's Motion for Rehearing, following determination by this Court of the issues raised in the appeal by Base Construction.

4. Conclusion

The record provides substantial support for the Registrar's conclusion that the work performed on the Fountain Hills project violated Arizona law and that Base was general contractor and therefore responsible for the deficient workmanship and the failure to take corrective action. Before it was divested of jurisdiction by the appeal, the Registrar of Contractors had scheduled the matter for rehearing on the remedy and Baxter's claims that the remedy ordered failed to comply with the Registrar's policies. The issue of remedy and all of the issues raised in the Motion for Reconsideration should properly be presented to the Registrar at the completion and conclusion of this case.

IT IS THEREFORE ORDERED affirming the decision of the Registrar that Base violated the stated provisions of Arizona law.

IT IS FURTHER ORDERED remanding this case back for all further and future proceedings to the Registrar of Contractors.

⁵⁵ Registrar's Order Vacating Hearing, July 24, 2002.

⁵⁶ 142 Ariz. 52,54, 688 P.2d 698, 700 (App. 1984).

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IT IS FURTHER ORDERED denying the relief requested by Plaintiff in this case.

IT IS FURTHER ORDERED that counsel for Defendants shall lodge an order and judgment consistent with this opinion before July 30, 2003.